**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 32**

(Oakland, California)

GOLDEN PLASTICS CORPORATION

Employer

and

DANIEL VELASCO, an Individual — Case 32-RD-1443

Petitioner

and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 162

Union

## DECISION AND DIRECTION OF ELECTION

The Employer manufactures plastic products at its two facilities in Oakland, CA. The Union represents a collective-bargaining unit of the Employer's employees at these two facilities.[1] The Petitioner, Daniel Velasco, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to decertify the Union as the collective bargaining representative of the employees in the collective-bargaining unit. A hearing officer of the Board conducted a hearing in this matter, and the parties made oral closing argument at the end of the hearing.[2]

[1] The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[2] The parties were given the opportunity to submit briefs; however, none of the parties submitted a brief.

As evidenced at the hearing and in the parties' closing arguments, the Union asserts that Velasco is a supervisor as defined in the Act and that the petition should be dismissed. The Union also asserts that Albert Diochea is a supervisor as defined in the Act and that he should be excluded from the unit. I have concluded that the evidence does not establish that Velasco and Diochea are supervisors as defined in the Act. Accordingly, I am directing that a decertification election be held among the employees in the collective-bargaining unit described below in this decision.[3] To provide a context for my discussion of the issues in this case, I will first provide a brief overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports my conclusions in this matter.

## OVERVIEW OF OPERATIONS

The Employer operates two facilities in Oakland, California where it is engaged in the manufacturing of custom plastics.[4] The facilities are located within 2 miles of each other. The Union represents a unit consisting of:

> All full-time and regular part-time production and maintenance employees employed by the Employer in Oakland, CA; excluding office clerical employees, all other employees, guards and supervisors as defined in the Act.[5]

There are approximately 5-6 employees at each of the Employer's two Oakland facilities. There is presently no collective bargaining agreement in effect.[6] At both locations, the employees operate a variety of equipment used to manufacture the plastic parts, such as an oven, a router,

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[3] It is well settled that the unit appropriate in a decertification election must be coextensive with either the certified or recognized bargaining unit. *Fast Food Merchandisers, Inc*., 242 NLRB 8 (1979). Here, the Employer has recognized and bargained with the Union and such recognition was embodied in a collective bargaining agreement between the Union and the Employer. Neither party disputes the appropriateness of the unit.

[4] During the previous twelve months, the Employer has purchased and received at its California facilities products valued in excess of $50,000 directly from vendors located outside the State of California. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

[5] The parties stipulated that the unit is an appropriate unit.

[6] No evidence was presented that reflects the length of the bargaining relationship or the expiration date of the parties' most recent agreement. The petition states that there is no current contract in effect and the parties stipulated that there was no contract bar to this proceeding. See Bd. Ex. 2.

and a grinder. For the most part, each employee is capable of operating each piece of equipment. After the goods are manufactured, they are packaged for shipment.

The Employer's three owner/managers, Stewart, Dan and Ron Pardee, all work primarily at the Employer's facility on Pearmain Street.[7] There are no managers stationed at the facility on Baldwin Street. The evidence shows that managers frequently visit and telephone the Baldwin facility.[8] Two members of the bargaining unit working at the Baldwin facility, Daniel Velasco (the Petitioner) and Albert Diochea, have been designated as "Shop worker/supervisors," and these two positions are functionally similar.[9]

Velasco has been employed by the Employer for approximately three years; Diochea has been employed by the Employer for more than twenty years and is by far the Employer's most senior employee. Both Velasco and Diochea are highly skilled employees and have worked for the Employer longer than any of the other employees at the Baldwin facility. They also spend the vast majority of their work time actually operating the manufacturing equipment, side by side with the other shop workers. Both are members of the Union, and Diochea is a shop steward for the bargaining unit.

Diochea and Velasco have keys to the Baldwin facility to open it in the morning. Velasco deactivates the alarm system. All employees, including Diochea and Velasco, work the same schedule, Mondays through Fridays, 8:00 to 4:30. As the Employer receives orders from its

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[7] The parties stipulated that these three individuals own the company and have the authority to hire, discipline and fire employees and that they are excluded from the unit. The parties also stipulated that secretary Sherry Shield is an office clerical employee, and therefore that she is excluded from the unit.

[8] The one owner/manager who testified at the hearing stated that the managers visit the Baldwin facility multiple times each week and that he personally goes there, on average, five times per week.

[9] Velasco testified at the hearing in this case. Diochea did not testify at the hearing and little evidence was presented regarding the scope of his authority. The Employer's Vice President, Daniel Pardee, testified that he has observed Diochea assign employees work, both in situations where Pardee has told Diochea whom should be assigned certain tasks and in situations where Pardee had not given Diochea such directions. There is no evidence regarding how often his occurs; nor is there evidence that his assignment of work was based on factors other than availability. Thomas Rangle, a Union business representative, also testified that Diochea had commented that he was "responsible for moving things along."

customers, it directs the orders to either the Pearmain or the Baldwin facility. To communicate an order to the Baldwin facility, a manager will contact Velasco, either in person or on the phone.

Quite often management will tell Velasco which employee he is to assign to each station for the production of a particular order. On other occasions, management leaves it to Velasco to designate which employee will work at which station. Velasco states that in most instances he assigns employees to a workstation based on availability. Velasco also testified that the oven is more difficult than other workstations and requires more experience.[10] He testified that normally he performs that work. On those occasions where Velasco is unavailable to work the oven and he has not been specifically told who is to work the oven, he assigns an employee to do the oven work. According to Velasco, he makes that assignment based on the employees' relative oven experience/skills, which he says is quite obvious. There is no evidence indicating that Velasco makes work assignments to employees that is inconsistent with the work assignments made by managers.

Similarly, Velasco testified that there are situations where all the employees are working on a project and there is additional work that needs to be done, such as shipping or grinding. He testified that in about half of these situations, management tells him which tasks get top priority. On the other occasions, Velasco decides which assignment to give priority. He testified that he makes the decision based on his experience, but also stated that if he were unsure, he would contact management. It appears that the day-to-day work routine at the Employer's Baldwin facility is typically about the same each day.

When Baldwin facility employees wanted to change their schedules or arrange for time off, they typically contacted a manager directly. On some occasions, when an employee has been unable to reach a manager, the employee has asked Velasco to notify management. Velasco has

[10] It is not clear in the record how difficult it is to operate the over, or how much training/experience is required to be able to operate the oven properly.

no authority to grant any requests for time off. If an employee simply fails to show up for work at the Baldwin facility, Velasco will notify management. Velasco has trained new employees, and, based on what he had been taught by management, he tells employees when he thinks they have done something incorrectly or in an unsafe manner. Velasco also testified that he has occasionally commented informally to management when he believes that an employee's performance needs improvement and that the employee should be talked to about their performance. Velasco said he recalled making such comments to management on one or two occasions in the last six months. He did not know whether management acted on his comments, and there is no evidence that an employee was counseled or disciplined based on Velasco's comments. Neither Velasco nor Diochea has had a role in hiring, disciplining, firing, promoting, or rewarding employees.

**ANALYSIS**

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *Bennett Industries, Inc.*, 313 NLRB 1363 (1994); *Tuscon Gas and Electric Co.*, 241 NLRB 181, 181 (1979). Section 2(11) of the Act defines a supervisor as one who possesses "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest, and requires independent judgment in a manner that is more than routine or clerical. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner, however, does not confer

supervisory status on employees. *Chicago Metallic Corp.,* 273 NLRB 1677, 1689 (1985); *Advanced Mining Group,* 260 NLRB 486, 507 (1982). Because supervisory status removes individuals from the protections of the Act, only those personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." S.Rep.No. 105. 80th Cong. 1 Sec. 4 (1947); *Ten Broeck Commons*, 320 NLRB, 806, 809 (1996).

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *NLRB v. Kentucky River Community Care,* 532 U.S. 706, 121 S.Ct. 1861 (2001); *Bennett Industries, Inc.,* 313 NLRB 1363 (1994); *Tucson Gas and Electric Co.,* 241 NLRB 181 (1979). To meet this burden the party asserting supervisory status must provide sufficient detailed evidence of the circumstances surrounding the alleged supervisor's decision making process in order to demonstrate that the alleged supervisor was exercising the degree of discretion or independent judgment that is necessary to establish supervisory status. *Crittenton Hospital*, 328 NLRB 879 (1999);[11] and *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000).[12]

In this case, it is the Union who has argued that Velasco and Diochea are supervisors, and I find that the Union has failed to satisfy its burden of proving the supervisory status of the "Shop worker/Supervisors."[13] Instead, the evidence shows that these individuals possess the

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[11] A further reason for requiring details about the alleged supervisor's decision making process is that independent judgment cannot be found where decisions are strictly regulated by specific employer policy. *Western Union Telegraph Co.*, 242 NLRB 825, 827 (1979). Thus, absent evidence regarding the nature and scope of the employer's policies, it would often not be possible to determine whether an alleged supervisor was actually exercising significant discretion.

[12] See also *Sears, Roebuck & Co.*, 304 NLRB 193 (1991); *Quadrex Environmental Co.*, 308 NLRB 101 (1992), which also reject the use of mere inference or conclusionary statements without supporting evidence to establish supervisory status.

[13] The Union argues that the Employer "admits" to the supervisory status of these employees because it designated them with the title "Shop Worker/Supervisor" on the Excelsior list submitted in conjunction with this petition. Regardless of what the Employer calls these employees, however, "it is well established that rank and file employees cannot be transformed into supervisors merely by being invested with that title." Carlisle Engineered Products, 330 NLRB 1359 (2000)

characteristics typical of experienced employees functioning as lead persons. As noted above, there is only a minimal amount of evidence, almost all of it conclusionary, regarding Diochea's purported supervisory authority, and I therefore cannot do a detailed analysis regarding his authority and status. However, based on the limited evidence regarding Diochea, I conclude that the evidence does not establish that his limited exercise of authority is anything more than the exercise of merely routine lead person authority, and I conclude that the evidence is insufficient to establish that he is a supervisor within the meaning of the Act. With regard to Velasco, for the reasons set forth below, I conclude that he is also not a supervisor within the meaning of the Act.[14]

Assignment and Responsible Direction of Work

Although Velasco does sometimes decide which employee will work at which station, the evidence shows that most of these assignments are based on the availability of employees and such assignments are therefore merely routine in nature. The one work assignment that is not based on availability is the oven station. Velasco normally performs that work himself, but there are some occasions when he is unavailable and another employee is assigned to do that work. If a manager has not informed Velasco who management wants to perform the oven work, Velasco makes the assignment.[15] Velasco testified that on those occasions he bases his decisions on the varying levels of oven work experience/skills of the shop workers, which he states were quite obvious. The scope of Velasco's exercise of discretion in making such assessments of employee skills and experience on oven work must be considered in light of the fact that "quite often" the Employer tells Velasco who is to work each station on a particular project. In these

[14] As noted above, there is conclusionary evidence that the Shop worker/supervisor positions are functionally similar. Because I have found Velasco not to be a statutory supervisor, even assuming that Diochea has and exercised the same level of authority as Velasco, I would not find Diochea to be a supervisor as defined in the Act.

[15] It is unclear from the record how often Velasco even makes such assignements.

circumstances, and particularly when there is no evidence that Velasco makes assignments to the oven station in a manner that is inconsistent with the Employer's oven station assignments, it appears that Velasco's assessment of employee skills and experience regarding oven work would inherently be heavily dependent on the pattern of oven work assignments established over the years by management. Because Velasco normally operates the oven himself and is often given direct orders by managers regarding which employees are to perform each of the various work assignments, I find that Velasco's assignment of work, including the assignment of oven work, is essentially routine in nature.

I reach the same conclusion regarding Velasco's authority to re-assign employees when higher priority work needs to be done. As with the initial assignment of work, Velasco does not make such decisions on his own. At least half of the time, a manager tells Velasco what work is to be given priority. On the other occasions, Velasco relies on his long-term experience and is readily able to rely on the patterns established by management over the years to determine which job is to be given priority. Moreover, when Velasco's experience does not make it clear regarding what priorities management would want in a particular situation, he asks a manager for direction. Therefore, Velasco's authority in setting work priorities is essentially routine in nature.

The evidence also shows that Velasco is responsible for training new employees and monitoring the efficiency and quality of production. These duties are consistent with his role as a more skilled employee and do not indicate supervisory authority. There is no evidence that Velasco makes any final determination regarding the quality of the final product or that he is personally responsible if the final product of another employee is unsatisfactory. The Board has long recognized that some highly skilled employees whose primary function is participation in the production or operating processes who incidentally direct the movement or operations of less skilled subordinate employees, nevertheless are not supervisors because their authority is based

on their working skills and experience. *Ten Broeck Commons*, 320 NLRB at 808-809.

In these circumstances, I conclude that the evidence does not establish that Velasco exercises the level of discretion that is necessary to establish that he assigns work or responsibly directs work within the meaning of Section 2(11) of the Act. *S.D.I. Operating Partners, L.P., Harding Glass Division*, 321 NLRB 111 (1996); See also *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994).

Other Indicia

Velasco on occasion comments to management regarding an employee's performance, sometimes in response to management inquiries. First I note that Velasco infrequently exercised this authority. Second, there was no evidence that Velasco's comments became a part of the Employee's personnel file or that the Employer ever disciplined or even counseled an employee based on Velasco's comments. Thus, the evidence does not establish that Velasco had the authority to effectively recommend discipline.[16]

Status of the Shop worker/Supervisors

Based on the record and the above analysis, I conclude that the Shop worker/Supervisors, including the Petitioner, do not possess any of the primary indicia of supervisory authority enumerated in Section 2(11) of the Act. Specifically, I find the record does not demonstrate that either Velasco or Diochea has the authority, in the interests of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline

[16] Although not raised by the Union, I would reject any argument that Velasco and Diochea must be supervisors because otherwise the employees at the Baldwin facility would be regularly working without on-site supervision. First, I note that there were typically only five to six employees working at the Baldwin facility, and the bulk of the work performed at this facility was primarily routine in nature and could reasonably be overseen by lead persons. Second, the evidence demonstrated that both of the Employer's facilities were in the city of Oakland, California. Third, members of management made frequent visits to, and had daily telephone contact with, the Baldwin facility, such that permanent on-site supervision was not necessary. I also note that if the Shop worker/supervisor positions are supervisory positions as defined in the Act, then, the Baldwin facility would have a ratio of two supervisors for four employees. In light of the routine, low skilled nature of the work performed there, and the frequent visits and telephonic communications from managers, such a supervisory ratio at the Baldwin facility would not make sense.

employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action in a manner which is not merely routine but requires independent judgment.

## CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by the Employer in Oakland, CA; excluding office clerical employees, all other employees, guards and supervisors as defined in the Act.

## DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by SHEET METAL

WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 162. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

**Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

**Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-521, on or before **December 29, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (432) 567-8911. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

**Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **January 2, 2004.** The request may **not** be filed by facsimile.

Dated at Oakland California this 18th day of December, 2003.

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Alan B. Reichard
Regional Director
National Labor Relations Board
Region 32

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